

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 159
3021711

BETWEEN MARIA VAN KLEEF
 Applicant

A N D ALLIANCE GROUP LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
 Mr John Farrow, Counsel for Respondent

Investigation Meeting: 28 to 30 May 2018 at Oamaru

Submissions Received: 17 August and 1 October 2018 from Applicant
 10 September 2018 from Respondent

Date of Determination: 2 November 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Ms van Kleef was unjustifiably dismissed.**
- B. Ms van Kleef suffered unjustifiable disadvantage in respect of three actions of the respondent summarised at paragraph [204] of this determination.**
- C. Ms van Kleef did not receive her full break entitlements in accordance with her statutory and contractual entitlements.**
- D. Remedies in respect of the above findings will be assessed and determined following further evidence and a further investigation meeting.**
- E. Ms van Kleef's other claims are dismissed.**
- F. Costs are reserved.**

Employment relationship problem

[1] Ms van Kleef claims that she was unjustifiably dismissed by the respondent and subjected to unjustified disadvantage in her employment, primarily by reason of not being able to take her daily rest and meal breaks in full. This issue shall be referred to in this determination as the 'encroachment issue'.

[2] Ms van Kleef also claims unjustified disadvantage in relation to alleged actions of the respondent in relation to the way it handled Ms van Kleef's protests about the encroachment issue and her refusal to work additional overtime.

[3] In addition, Ms van Kleef claims that she was not paid certain payments she was entitled to.

[4] The respondent denies that Ms van Kleef was unjustifiably dismissed, saying that she was dismissed for failing to follow a reasonable and lawful instruction to work reasonable overtime pursuant to the terms of the applicable collective agreement. It also denies that she was subjected to unjustified disadvantage in her employment and asserts, in any event, that Ms van Kleef did not raise a valid personal grievance within 90 days with respect to several of her claims of disadvantage.

[5] The respondent also asserts that Ms van Kleef has been paid all moneys due to her.

[6] This determination deals with liability issues only for reasons that are explained below.

Background and material events leading to dismissal

[7] Ms van Kleef worked at the respondent's meat processing plant at Pukeuri, Oamaru for one year in the 1990s and then continuously between 2002 and 24 April 2017, the date she was dismissed. For the majority of that latter period Ms van Kleef worked in the P5 processing room working a day shift mainly as a packer in the middle weighing area, combined with vacuum packing (known colloquially as the vac pac).

[8] Ms van Kleef was a member of the New Zealand Meat Workers Union and so was bound by the terms of the collective agreement entered into between the union,

the New Zealand Meat Workers and Related Trades Union Incorporated, and the respondent. At the time of her dismissal, Ms van Kleef was employed pursuant to the collective agreement in force between 2016 and 2018. Clauses 4(i) and 4(j) of the collective agreement provided as follows:

4(i) When requested by the employer, workers in any or all departments shall work one hour overtime on any weekday as defined or arranged by clause 3. Such extra work to be in addition to the ordinary work for that day. The working of such overtime shall be decided on the facts relating to the individual plant concerned in consultation with the workers' representative.

4(j) The provisions of this clause are an acknowledgment that the workers bound by this Agreement have a responsibility which they will comply with to work reasonable overtime in accordance with the requirements of the employer.

[9] On 28 October 2016 Ms van Kleef wrote a letter to Dave Park, operations manager of the Pukeuri plant which stated "I find myself unavailable for overtime at the moment." Her stated reason for this was that her break times were being depleted to the extent of the equivalent of one break a day. The reasons Ms van Kleef gave in the letter were that she had to take her personal protective equipment (PPE) off before entering the smoko room and then had to put it on again prior to returning into P5. She also complained about meat taking between five to ten minutes to get through to her in the middle area. She said that she was also expected to be at her Vac Pac station three minutes after the process restarted. In her letter Ms van Kleef also complained about inefficiencies in the way the room was run which "caused complete chaos and stress".

[10] On the basis of her estimation that she effectively lost one break a day because of the encroachment, Ms van Kleef refused to work the overtime pursuant to clause 4(i) of the collective agreement. She expressed a hope that management could address the speed the room ran at and ended her letter by saying "I would be quite happy to do overtime for the good of the company when and if that happens".

[11] Mr Park, who was overseas at the time of the Authority's investigation meeting, has sworn an affidavit saying that he did not recall ever receiving a copy of the letter that Ms van Kleef referred to and only became aware of it in 2017 when he was the note taker in a meeting with her.

[12] Ms van Kleef raised her concerns about her breaks being encroached upon with the National Secretary of the Meat Workers Union who suggested that she speak with the local union secretary, Tom Latimer.

[13] According to Mr Ivan Docherty, acting plant manager at Pukeuri, February 2017 was a busy time at the plant with a significant increase in carcasses to be processed. As a result, the respondent needed workers to do 30 minutes' overtime at the end of each shift for a period of approximately two weeks. A number of workers had different reasons for not wanting to do overtime and Mr Docherty, in conjunction with various supervisors, addressed each instance on a case by case basis.

[14] Mr Docherty said he had been told that two employees had written letters indicating that they were not available to do overtime on an ongoing basis. Ms van Kleef was one of these employees. Mr Docherty says that no overtime during weekdays had been required between October 2016 and February 2017 so it was only in 2017 that he became aware of Ms van Kleef's letter to Mr Park. The other employee who declined to do overtime gave as a reason a secondary business he had. Mr Docherty says that this reason was investigated and a disciplinary process commenced which ended with that worker being given a warning. Mr Docherty says that the same process was followed with Ms van Kleef.

[15] Mr Docherty met with Ms van Kleef for the first time on 22 February 2017. Ms van Kleef was called to the union office a few minutes before to meet with the union delegate, Mr Latimer, before going to the meeting, in accordance with the respondent's normal practice. Ms van Kleef says that she was not prepared for this meeting, as it was unexpected, and she did not have her paperwork with her.

[16] The Authority saw a note of the meeting on 22 February prepared by Mr Docherty. These minutes show that Ms van Kleef was accompanied by Mr Latimer, and that Mr Docherty discussed Ms van Kleef's concerns about her breaks being encroached upon due to the amount of PPE gear that was required to be cleaned, and taken off and put back on. Mr Docherty said that, although workers in her area were the last to go for breaks, they were also the last to return so that she got the same amount of time as everybody else.

[17] Mr Docherty agreed to investigate whether the P5 room at Pukeuri could adopt the same practice as the Smithfield plant where the entire workforce in a room stops

for their breaks all at the same time, and produce is left on the belts to allow everybody to go for their breaks at once. In Pukeuri, the employees took rolling breaks, with workers from different parts of the room going on their breaks, and returning, at different times.

[18] The minutes also show that Mr Docherty said to Ms van Kleef that she would be required to work the requested overtime as she was obliged to under the terms of the collective agreement or else she would be “putting her job at risk through the disciplinary process”. Ms van Kleef stated that she would work overtime on Saturdays but not the 30 minutes each day. The notes also show that Mr Latimer advised her to comply with the request.

[19] Mr Docherty says in evidence that he phoned the compliance manager of the respondent to discuss the concept of the Smithfield approach to taking breaks in P5 at Pukeuri and that the manager shared his concerns about the risks surrounding the approach, which would be congestion in the washrooms and stairwells. The Authority also saw notes of a meeting between Mr Docherty, Mr Park, Mr Latimer and another union delegate, Ross Kinnamon, and that both delegates also had reservations about congestion if the whole room took their break at once.

[20] The notes also record that Mr Kinnamon stated that Ms van Kleef did not miss out on her breaks as she was often late back with many of the other staff expressing their disapproval. Ms van Kleef says that she had not been aware of that meeting with the union and had not been told the outcome of the decision not to follow up on her suggestion of stopping the room entirely at break time. Ms van Kleef denies that she used to be late back from her breaks and says that Mr Kinnamon always left the room a lot earlier than her in any event, so he had no knowledge of when she was leaving the room or when she got back, and had made no attempts to find out.

[21] Ms van Kleef did not perform overtime on 22 February 2017 despite Mr Docherty instructing her to do so and so he asked Gary Byrne, the then personnel manager, to arrange a meeting with Ms van Kleef to discuss this. This meeting took place on 23 February. Ms van Kleef was again represented by Mr Latimer. The allegation put to her was that she had failed to carry out a reasonable and lawful instruction to work 30 minutes overtime in breach of her contractual obligations.

[22] The notes of the meeting of 23 February show that there was some discussion between Mr Byrne and Ms van Kleef as to whether she had, by her own admission, failed to follow a reasonable and lawful instruction. Ms van Kleef questioned the instruction being reasonable as she considered “the company’s encroachment of her break time to be [her already working] reasonable overtime”. She says that she also refuted that the instruction was lawful. Ms van Kleef also stated that she could not physically stand for another 30 minutes.

[23] As a result of this meeting Ms van Kleef was issued with a first written warning and advised that, “if there were any further proven allegations”, they could result in her dismissal. The warning was expressed to be live for one year, expiring on 23 February 2018. Ms van Kleef refused to sign the warning and Mr Latimer wrote on her behalf that she did not acknowledge that she had disobeyed a lawful instruction as she considered encroachment into her break to be reasonable overtime.

[24] At the end of the meeting Mr Byrne told Ms van Kleef that he was expecting her to do overtime from that point on as rolling overtime had by then been put in place in room P5 with a continuous instruction from management for workers to do overtime.

[25] Ms van Kleef did not work the 30 minute overtime on the evening of 23 February 2017 and Mr Byrne was advised of this fact. He therefore called Ms van Kleef to a meeting and she was again represented by Mr Latimer. At this meeting Ms van Kleef repeated her previously expressed position. During the meeting Mr Latimer said to Ms van Kleef that he had spoken to the union’s Otago/Southland branch president, and that the position of the union was that workers needed to do overtime in accordance with the collective agreement. Ms van Kleef said that she was not going to take the advice of the union.

[26] Mr Latimer said that the union could no longer represent Ms van Kleef if she was not going to follow his advice and Mr Byrne asked if Ms van Kleef needed to speak to a different representative, to which she replied that she would be seeking advice from a lawyer. She was again warned that she could be dismissed but Mr Byrne reserved his decision on the basis that Ms van Kleef wanted to seek different representation. He therefore adjourned the meeting to allow Ms van Kleef to get further advice.

[27] Between 25 February and 14 March the respondent did not require Ms van Kleef to do overtime during weekdays. On 14 March, Mr Byrne contacted Ms van Kleef to find out her progress in finding a representative and gave her until 17 March to advise him of the timeframe when the next meeting would be held.

[28] Ms van Kleef instructed a solicitor, Jay Lovely, who contacted Mr Byrne on 16 March 2017. Mr Byrne provided Mr Lovely with copies of the notes of the meetings, together with a copy of the previous collective agreement advising Mr Lovely that it was not the most current collective agreement as a new version was “undergoing ratification” but that the relevant overtime clause was the same in both versions. Ms van Kleef asserts that Mr Byrne deliberately misled Mr Lovely about the status of the collective agreement.

[29] A meeting took place between Ms van Kleef, Mr Lovely, Mr Docherty and Mr Byrne on 27 March 2017 during which Mr Lovely and Mr Byrne discussed Ms van Kleef’s obligations to work overtime and the company’s obligation to provide full rest breaks. The minutes record that the meeting ended with Mr Byrne saying that it had been proven through Ms van Kleef’s own admission that she did not carry out a lawful instruction, but him agreeing that Mr Lovely could submit a written submission prior to a final decision in relation to Ms van Kleef’s employment.

[30] Mr Lovely wrote to Mr Byrne on 28 March with his submissions and Mr Byrne responded by way of a letter dated 6 April, stating that the issue of encroachment of breaks was entirely separate from whether the instruction to work overtime was a lawful and reasonable instruction. He argued that overtime was required relatively infrequently at Pukeuri and rejected the notion that half an hour’s overtime a day was unreasonable. He also stated that issues about encroachment should be taken up with the union, and advanced during collective bargaining, and that Ms van Kleef’s action in refusing to undertake overtime amounted to a form of industrial action which was not supported by the union.

[31] Mr Byrne said that even if the union did not support Ms van Kleef she could still continue to pursue the matter with the company management, but that she could not undertake a unilateral protest action. Mr Byrne also stated that dismissal was justified but that he was prepared to allow Ms van Kleef a final opportunity to reconsider her position and how she should advance her concerns at plant level. He

stated “it would be unfortunate for your client to lose her job here because she has painted herself into a corner”.

[32] Mr Byrne concluded his letter as follows:

If your client is willing to provide an undertaking that she will pursue her concerns through the established channels, then I would be prepared to accept that undertaking and deal with this incident by way of final warning on the basis that it has been a learning curve.

If not, then the outcome is dismissal as there is nothing more I can do and the issue will have to play itself out in other forums.

I am prepared to give Maria seven days to reflect on the matter and advise her decision.

My final day of work is 7th April however I have advised my decision in relation to this matter above and all that remains is for Maria to advise her position either through you or if she prefers, in person with Ivan Docherty, Production Manager at the plant.

[33] Mr Byrne finished working for the respondent on 7 April 2017 and, from that point on, Mr Docherty in his role as acting plant manager stepped in to be the decision-maker. On 13 April 2017 Ms van Kleef left a letter at reception dated 10 April which commenced as follows:

Please be advised that I intend to raise a personal grievance, constructive dismissal over my treatment on this matter.

[34] In her letter Ms van Kleef then went on to ask for copies of various agreements (as she did not have possession of their current room agreement or the entire, up to date collective agreement, for example) and raised a complaint about not being given sufficient information about whether the encroachment issue had been settled between the company and the union previously by payment of a 0.5% additional pay rise. I shall deal with this matter in more detail below, as Ms van Kleef includes this as part of her complaint against the respondent.

[35] In the letter Ms van Kleef also complained about management and the union failing to investigate the encroachment issue, and outlined in some detail what she believed were causing the encroachment issues.

[36] On 19 April 2017 Mr Docherty and Mr Park met with Ms van Kleef, who said that she did not want to have a representative with her. Mr Docherty called the meeting to discuss Mr Byrne’s letter of 6 April and said that he preferred if Ms van

Kleef would work to her employment contract, making herself available for overtime, but that if she was not willing work to her employment conditions then “she left me with little option but to dismiss her”. Mr Docherty adjourned the meeting until the following day to allow Ms van Kleef to consider whether she was willing to complete overtime as requested.

[37] Mr Docherty, Mr Park and Ms van Kleef met again on 20 April. This time Ms van Kleef had a co-worker with her as a support person. Ms van Kleef asked for copies of documents that she had requested in her letter of 10 April and was provided copies of them later that morning. Ms van Kleef had expected to be suspended or dismissed that day, so she did not have her work gear with her. Mr Docherty therefore suspended her for the remainder of that day (Thursday 20 April) and the next day so, he said, she would have time to look through the documentation before meeting again on Monday 24 April.

[38] Mr Docherty said that he also talked about pay increases and how they related to the union negotiations about breaks, saying that he had limited information on the issue. Mr Docherty says that, at the end of the meeting, he reiterated to Ms van Kleef that she was refusing to do overtime and that the likely outcome would be dismissal if she continued to refuse.

[39] Ms van Kleef, Mr Park, Mr Docherty and Ms van Kleef’s support person met again on Monday 24 April. Mr Docherty said that this was the last opportunity for Ms van Kleef to present any further submissions or make a decision about the options in Mr Byrne’s letter of 6 April. In the meeting Ms van Kleef refused to confirm that she would work weekday overtime. Mr Docherty adjourned the meeting and says the following in evidence:

I went away and realised I had no alternative but to make a decision to dismiss Maria including because;

- (a) Maria was intent on refusing to do overtime;
- (b) Maria’s actions were disruptive to other workers;
- (c) Maria had not worked with us in good faith to solve the potential problems she was raising;
- (d) Allowing Maria [to] refuse instructions to do overtime without just cause would set a bad precedent; and
- (e) It was clear to me that Maria was on a campaign and was going to continue to refuse to do overtime in breach with her agreement with Alliance.

[40] Mr Docherty reconvened the meeting and told Ms van Kleef that he was dismissing her for refusing to follow a lawful instruction. A letter of dismissal was given to Ms van Kleef dated 24 April 2017. This stated as follows:

Dear Maria,

This letter is to confirm that you were dismissed from your employment at Alliance Group Pukeuri Plant on Monday 24 April 2017 for refusal to follow a lawful and reasonable instruction by a Supervisor to undertake a reasonable request of overtime.

The dismissal comes at the end of a long investigation process where you were encouraged to pursue your workplace issues through the proper channels.

You have received this message from the union and the company but rather than take the message on board you have instead come back raising more issues and demonstrating that you are determined to pursue your own form of industrial action to the end.

In your letter of 10 April 2017 (delivered on 13th April) you requested certain industrial agreements which have been provided. You acknowledged that you were informed a number of months ago that the issue of encroachment of breaks was resolved by the company and the union during collective bargaining a number of years ago.

Despite this, it has been made clear to you that the company is open to working through any of your work issues on a good faith basis, provided you are prepared to engage with the process.

You have shown no interest in pursuing these issues through the established channels and clearly wish your employment to end so you can pursue your claim to a personal grievance.

Your reference to constructive dismissal is confused given that you are still attending work and performing your work duties.

I am saddened by your approach and do not welcome a process which will incur much time and energy as well as cost but you leave me with no choice. You have rejected the company suggestions for how this could be avoided and the issues worked through constructively.

Accordingly, you have left me with no option but to enforce the letter issued 31st March 2017 with termination of your employment. That is your choice.

Your final pay will be paid into your bank account Wednesday 26 April 2017.

[41] On 4 May 2017 an advocate for Ms van Kleef wrote a letter to the respondent raising a personal grievance about the giving of warnings, the suspension of Ms van Kleef and her dismissal.

The issues

[42] Ms van Kleef has developed, and sought to add to her claims during the life of the proceedings, including after the investigation meeting, which I have allowed her to do to an extent, given that she is self-represented and is raising serious allegations against the respondent. The respondent has always had the opportunity to comment and provide further information in response.

[43] However, Ms van Kleef's first set of written submissions were lengthy, comprising 235 pages of narrative and 33 pages of attachments. Incorporated into her narrative were extracts from cases (including overseas cases); evidence, some previously unseen; extracts from legislation; and extracts from various commentaries. Whilst Ms van Kleef has undoubtedly worked hard to present her case, and has evidently done extensive research, her submissions were somewhat confusing in places, and it is possible that I have missed some aspects of the multi-faceted claims she has sought to bring. Mr Farrow's submissions in reply carry the same proviso. This determination attempts to address every claim that I can understand.

[44] There are a number of issues and sub issues to be determined. The key issues are as follows:

- a. Was Ms van Kleef unjustifiably dismissed?
- b. Was Ms van Kleef prevented from taking rest and meal breaks contrary to her statutory and contractual rights?
- c. Did Ms van Kleef suffer unjustified disadvantage in her employment caused by various unjustified actions of the respondent?
- d. Was Ms van Kleef underpaid by reference to various rights in the collective agreement and the P5 room agreement?
- e. Was Ms van Kleef unlawfully locked out pursuant to s 82 of the Employment Relations Act 2000 (the Act)?

[45] I shall address the various sub issues arising under each of these headings.

Was Ms van Kleef unjustifiably dismissed?

[46] There are two distinct routes by which Ms van Kleef alleges that she was unjustifiably dismissed. The first is by reference to the usual principles of fairness set out in ss 4 and 103A of the Act. The second is by way of s 67F of the Act. As I explain below, I find that the respondent did contravene s 67F of the Act by dismissing Ms van Kleef. I shall therefore not also consider whether the respondent's actions were justified in accordance with s 103A of the Act, as that is not necessary when considering s 67F and s 103(1)(i).

Section 67F

[47] Ms van Kleef argues that the collective agreement which was in force when she was dismissed contained an availability provision in accordance with s 67D of the Act, which did not comply with the statutory requirements in relation to such provisions. Accordingly, she says, her dismissal was in breach of s 67F of the Act. The respondent argues that:

- a. Clause 4 of the Collective Agreement cannot be interpreted as an availability provision, and so s 67D and the following provisions cannot apply;
- b. The Collective Agreement was renewed from 23 February 2016, and so a compliant availability provision was not required; and
- c. Alternatively, clause 4 of the collective agreement is a valid availability provision in accordance with s 67D of the Act.

[48] Sections 67C to 67F of the Act provide as follows:

67C Agreed hours of work

(1) Hours of work agreed by an employer and employee must be specified as follows:

- (a) in the case of an employee covered by a collective agreement,—
 - (i) in the collective agreement; and
 - (ii) if section 61 applies, in the employee's additional terms and conditions of employment included under that section; or
- (b) in the case of an employee covered by an individual employment agreement, in the employee's individual employment agreement.

(2) In subsection (1), **hours of work** includes any or all of the following:

- (a) the number of guaranteed hours of work;
- (b) the days of the week on which work is to be performed;

- (c) the start and finish times of work:
- (d) any flexibility in the matters referred to in paragraph (b) or (c).

67D Availability provision

(1) In this section and section 67E, an **availability provision** means a provision in an employment agreement under which—

- (a) the employee's performance of work is conditional on the employer making work available to the employee; and
- (b) the employee is required to be available to accept any work that the employer makes available.

(2) An availability provision may only—

- (a) be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and
- (b) relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.

(3) An availability provision must not be included in an employment agreement unless—

- (a) the employer has genuine reasons based on reasonable grounds for including the availability provision and the number of hours of work specified in that provision; and
- (b) the availability provision provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision.

(4) An availability provision that is not included in an employment agreement in accordance with subsection (3) is not enforceable against the employee.

(5) In considering whether there are genuine reasons based on reasonable grounds for including an availability provision, an employer must have regard to all relevant matters, including the following:

- (a) whether it is practicable for the employer to meet business demands for the work to be performed by the employee without including an availability provision;
- (b) the number of hours for which the employee would be required to be available;
- (c) the proportion of the hours referred to in paragraph (b) to the agreed hours of work.

(6) Compensation payable under an availability provision must be determined having regard to all relevant matters, including the following:

- (a) the number of hours for which the employee is required to be available;
- (b) the proportion of the hours referred to in paragraph (a) to the agreed hours of work;
- (c) the nature of any restrictions resulting from the availability provision;
- (d) the rate of payment under the employment agreement for the work for which the employee is available;
- (e) if the employee is remunerated by way of salary, the amount of the salary.

(7) For the purposes of subsection (3)(b), an employer and an employee who is remunerated for agreed hours of work by way of salary may agree that the employee's remuneration includes compensation for the employee making himself or herself available for work under an availability provision.

67E Employee may refuse to perform certain work

An employee is entitled to refuse to perform work in addition to any guaranteed hours specified in the employee's employment agreement if the agreement does not contain an availability provision that provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the availability provision.

67F Employee not to be treated adversely because of refusal to perform certain work

(1) An employer must not treat adversely an employee who refuses to perform work under section 67E.

(2) In this section, an employer **treats an employee adversely** if the employer—

(a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially the same qualifications, experience, or skills employed in the same or substantially similar circumstances; or

(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or

(c) retires that employee, or requires or causes that employee to retire or resign.

(3) For the purposes of subsection (2)(b), **detriment** includes anything that has a detrimental effect on that employee's employment, job performance, or job satisfaction.

Is the overtime provision an availability provision?

[49] Ms van Kleef argues that the collective agreement was required to comply with the Act in relation to availability provisions because the compulsory overtime clause contained at clause 4(i) was an availability provision. This is denied by the respondent.

[50] Mr Farrow asserts on behalf of the respondent that the wording of clause 4 of the collective agreement does not constitute an availability provision as Ms van Kleef was not required to be available to accept work. Instead, she was required to work finite additional hours for a limited number of weeks a year. She was given notice that she would be required to work overtime. Mr Farrow says that employees were not being required to be available to accept work that may become available, but were being required to work additional hours that existed.

[51] Mr Farrow said that, once standing notice had been given to the workers of overtime being required, that extra time became part of their guaranteed hours, and there was no uncertainty on a day to day basis about the employees being required to

be available to do the extra thirty minutes' work. They knew they would be required to work it during the period of standing notice, and were not required to remain ready, willing and able to accept work that may or may not be required.

[52] In order to determine which argument is correct, it is necessary to consider carefully the provisions of s 67D. That is to say, it is necessary to determine whether the compulsory overtime clause in the collective is an availability provision as defined. First, it must be a provision under which Ms van Kleef's performance of work was conditional on the respondent making work available to her. I am satisfied that the overtime provision was such a provision as the overtime work fell outside of the ordinary daily hours of work specified in clause 3(a) of the collective agreement. If the overtime work was not made available she did not have to work it.

[53] Second, it must be a provision under which Ms van Kleef was required to be available to accept any work that the respondent made available. The clause at 4(i) makes clear that the employee 'shall' work one hour overtime on any weekday when requested by the employer. Whilst I accept that the requirement only arose when the respondent had decided that compulsory overtime needed to be worked, and gave the employees notice to this effect, Ms van Kleef was still required to be available to work the overtime from shortly after notice was given. The notice was given in accordance with operational requirements. It was not exactly the same weeks every year.

[54] In that sense, I disagree with Mr Farrow's analysis that Ms van Kleef was not required to remain ready, willing and able to accept work that may or may not be required. The overtime was not a permanent feature of employment, required or guaranteed the whole year round. Ms van Kleef may have been able to have predicted when it was likely to be required, or not required, but she still had to be available to do it when it was required.

[55] Evidence was heard from the respondent that it would excuse employees from working overtime on two occasions:

- a. Where there was a specific reason relating to that individual and the specific day in question, such as sickness, unplanned child care responsibilities or the like;

- b. For religious reasons, although the only example given related to Saturday overtime, not weekday overtime.

[56] Even though the respondent may excuse an employee for not working overtime when they had a valid reason, the working of overtime in accordance with clause 4(i) was expected to be complied with and was enforced, as is demonstrated by Ms van Kleef's dismissal.

[57] I am thereafter satisfied that Ms van Kleef was required to be available to accept the overtime and that, in turn, the overtime provision in clause 4 of the collective agreement was an availability provision.

Was a compliant availability provision required?

[58] In its statement in reply the respondent asserted that "the applicable collective agreement was renewed from 23 February 2016, and will be replaced following the upcoming bargaining round. The availability provisions therefore are not required in the current collective agreement". The respondent is relying upon the transitional provisions in relation to the applicable legislation, which are contained in Schedule 1AA of the Act, at clause 3(2), which provides as follows:

(2) If a collective agreement (the **previous agreement**) is in force immediately before the commencement of the 2016 Act (whether or not bargaining has been initiated under section 41(3) or (4)), sections 67C to 67H (as inserted by section 9 of that Act) apply to—
(a) any collective agreement that replaces the previous agreement, on the commencement of the replacement agreement; and
(b) an individual employment agreement that comes into force under section 61(2)(a), based on the previous agreement and any additional terms and conditions agreed under section 61(1), on the commencement of the individual employment agreement.

[59] The availability provisions of the Act came into force on 1 April 2016. Clause 55 of the collective agreement states:

This Agreement shall be deemed to have come into force on 23 February 2016 and shall remain in force until 8 January 2018.

[60] However, the copy of the collective agreement put before the Authority bore the stamp of the New Zealand Meat Workers and Related Trades Union seal and was dated 7 March 2017. In other words, the version of the collective that was in place on the day Ms van Kleef was dismissed (24 April 2017) was a collective agreement that

replaced the previous agreement which was in force immediately before 1 April 2016, when the availability provisions of the Act came into force.

[61] Whilst it appeared that the respondent was saying in its statement in reply that the collective agreement that was in force when Ms van Kleef was dismissed had been in force on 23 February 2016, this is clearly factually incorrect, and so it now seeks to rely upon an argument based upon the deeming provision in clause 55, saying that it was the intention of the parties to the collective agreement that bargaining regarding availability provisions would take place before the parties were obliged to include availability provisions.

[62] Mr Smith gave evidence that there was a long established history of collective agreements commencing retrospectively, from the expiry date of the previous agreement, as there was often a back-payment component, and because there is a need for continuity in the service entitlement provisions.

[63] However, s 238 of the Act provides that the provisions of the Act have effect despite any provisions to the contrary in any contract or agreement. Therefore, whilst the deeming provision was lawful and valid for the purposes of clarifying when back pay or other rights commenced, it has no effect in displacing the effects of the transitional provisions. Clearly, the collective agreement that was current when Ms van Kleef was dismissed was a replacement of the previous collective agreement in force immediately before 1 April 2016. Therefore, the provisions of s 67D to 67F of the Act had to be complied with.

[64] Mr Farrow also argues that the respondent was not at liberty to unilaterally include an availability provision, and that a union could unfairly force an employer to be non-compliant with the Act if it was found that the collective agreement contained a non-compliant availability provision. However, hypothetical undesirable consequences cannot inform the way the Authority interprets the requirements of s 67D and the terms of the collective agreement.

[65] I conclude that the transitional provisions do not apply to exempt the collective agreement from the requirements of s 67D of the Act.

Was the collective agreement complaint with the requirements of s 67D, et seq., in any event?

[66] For an availability provision to be validly incorporated into an employment agreement, certain conditions must be satisfied. These were summarised by a full court of the Employment Court in *Matthew Fraser v McDonald's Restaurants (New Zealand) Limited*¹ as follows²:

- (i) Such a provision may only be included in an employment agreement that specifies “agreed hours of work” within which there are “guaranteed hours of work”: s 67D(2)(a).
- (ii) “Hours of work”, as agreed between an employer and an employee, must be specified in any employment agreement: (s 67C(1)). These include any or all of the following:
 - the number of guaranteed hours of work;
 - the days of the week on which work is to be performed;
 - the start and finish times of work; and
 - any flexibility in the matters referred to in the previous two definitions: (s 67C(2)).
- (iii) The provision may only relate to a period for which an employee is required to be available which is in addition to that employee’s guaranteed hours of work: (s 67D(2)).
- (iv) An availability provision may not be included in an employment agreement unless the employer has genuine reasons based on reasonable grounds for including it, and for including the number of hours specified in that provision. An employer must have regard to all relevant matters when considering genuine reasons, including three which are specified: s 67D(3)(a) and (5).
- (v) Such a provision must provide for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision. The compensation payable must be determined having regard to all relevant matters, including five specified matters: (s 67D(3)(b) and (6)).
- (vi) An availability provision that is not included in an employment agreement, specifying the last two factors, is not enforceable: s 67D(4).

[67] The hours of work clause in the collective agreement is contained at clause 3, and reads as follows:

- (a) Except where otherwise hereinafter specified, the ordinary daily hours of work shall not exceed eight (including rest breaks) on five days of the week, Monday to Friday, both days inclusive.
- (b) In the case of all processing plants the ordinary daily hours in all departments may be worked either between 7.30 am and 4.30 pm or 8.00 am and 5.00 pm on five days of the week, Monday to Friday, both days inclusive as suits local conditions by agreement between the employer and the workers’

¹ [2017] NZEmpC 95

² At [8].

representative concerned; provided, however, that these hours may be varied in any particular processing plant by agreement in writing between the employer and the workers' representative.

- (c) Sticking operations may start 15 minutes earlier than the time specified or otherwise agreed upon in this clause; provided, however, that in the case of "on-the-rail" beef and calf dressing systems stunning and sticking operations may start earlier than the time specified or otherwise agreed upon in this clause so that workers can be introduced progressively into the system and the eight-hour span calculated for each worker from the time the workers commences their duties in the system.

[68] The collective agreement also recognises that additional departmental agreements may be concluded between authorised on-plant representatives of the employer and on-plant representatives of the workers, which are binding and enforceable "according to their tenor". There is in force at Pukeuri a "P5 Additional Departmental Agreement" (also known as a "room agreement") that applied to Ms van Kleef. This specified:

The normal working day/shift shall consist of up to 480 minutes working time plus meal and rest breaks.

[69] The room agreement gave "indicative start/finish times and rest breaks". The indicative hours of work in the room agreement were 06.40 to 15.40, although I understand that, in practice, the finish time for P5 was 16.00 by the time of Ms van Kleef's dismissal. In addition, the times and durations of the rest breaks had been changed in practice by the time of Ms van Kleef's dismissal, although the room agreement had not been amended. The room agreement also did not contain a compulsory overtime clause, although it stated that any overtime would be paid in accordance with the collective agreement.

"Agreed hours of work" within which there are "guaranteed hours of work"

[70] Mr Farrow submits for the respondent, as an argument in the alternative, that clause 3 of the collective agreement defines the agreed hours of work, specifying the usual hours of work and the start and finish times. It also preserved flexibility for employees by specifying sufficient notice to require overtime.

[71] Mr Farrow also says that, when read in totality, clause 3 specifies the number of guaranteed hours of work, which are:

- a. The ordinary daily hours;

- b. That may be worked either between 7.30 am and 4.30 pm or 8am and 5pm (9 hours);
- c. Monday to Friday;
- d. Five days a week;
- e. Provided that these hours may be varied in a processing plant by agreement in writing between the employer and the workers' representative.

[72] Mr Farrow says that the evidence shows that Ms van Kleef had the same working hours with minor fluctuations for many years of seasonal employment.

[73] I accept that there are agreed hours of work specified in the collective agreement in accordance with s 67C of the Act. These are “between 7.30 am and 4.30 pm or 8.00 am and 5.00 pm on five days of the week, Monday to Friday”.

[74] Were there guaranteed hours included among those agreed hours? There is no definition of “guaranteed hours” in the statute and so it is not clear whether specific guaranteed hours must be named on specific days. As s 67D(2)(b) requires that an availability provision may only “relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work” this suggests that the guaranteed hours must be specified either in number (e.g., 4 hours per day or 30 hours per week, say) or by way of specific hours on specific days.

[75] The P5 room agreement refers to the “normal” working day/shift consisting of “up to 480 minutes working time”. It also refers to “indicative” start and finish times, and provides that the hours are subject to review and change by the company to meet operational requirements. It also states “Where a worker works a normal day...”.

[76] All of these references suggest that the agreed working hours are not guaranteed, either in terms of their daily or weekly number, or in terms of specific times and days. This is reinforced by the statement in clause 3(b) of the collective agreement that the ordinary daily hours in all departments “may be worked...”. Whilst, in practice, the P5 room may have operated continuously and Ms van Kleef may have always worked at least eight hours per day, the requirement in s 67D(2)(a) is that the guaranteed hours must be included in the employment agreement. My

finding is that the collective agreement and the P5 room agreement did not specify guaranteed hours for Ms van Kleef.

Genuine reasons based on reasonable grounds for including the availability provision

[77] I accept that the respondent has genuine reasons based upon reasonable grounds for needing its workers, including Ms van Kleef, to work overtime as specified in clause 4(i) of the collective agreement. The nature of its operation is such that it will occasionally have more carcasses to deal with than can be processed in a normal working day shift, and that further hours need to be worked.

Payment of reasonable compensation for making herself available to perform work under the provision

[78] The overtime that was required to be worked under the collective agreement by Ms van Kleef was paid at 1.5 times the applicable piece rate for the first three hours of overtime, and double rate thereafter. Does this count as reasonable compensation for making herself available? In my view, it does not. Those penal rates were payment for actually working over the usual working time.

[79] The payment of penal rates for working compulsory and voluntary overtime is extremely common in many industries, and reflects the fact that workers are giving up time to work that they would otherwise have free. Working up to an extra hour at the end of a full day's physical work, or an extra four hours on a Saturday at the end of a five day working week, has the potential to increase tiredness, and theoretically, injuries and stress. It is that for which the additional pay is compensating the worker. Not for agreeing to be available to work compulsory overtime.

[80] The collective agreement does not differentiate between the rates paid for working compulsory overtime and voluntary overtime. This suggests that voluntary overtime would be paid at the same rate. This reinforces the view that the penal rate cannot incorporate any element of compensation for Ms van Kleef making herself available to work compulsory overtime above any guaranteed hours.

[81] Mr Farrow suggests that payment for availability for overtime is rolled-up into a piece rate. However, I have seen no independent evidence that that is the case. In any event, s 67D(3)(b) states that the availability provision must "provide[s] for the

payment of reasonable compensation to the employee....” That suggests that the reasonable compensation must be specifically identified as a monetary amount.

Conclusion

[82] In conclusion, the availability provision in the collective agreement consisting of the compulsory overtime provisions do not comply with the requirements of s 67D of the Act. I do not agree with the implication made on behalf of the respondent that the provisions of s 67D et seq. apply only to zero hours contracts.

[83] From this conclusion flows the further conclusion that Ms van Kleef was entitled to refuse to work the compulsory overtime she was asked to work. This is because s 67E makes clear that she was entitled to refuse because of the absence of a provision to pay her reasonable compensation.

[84] The final conclusion that must flow is that the respondent’s dismissal of Ms van Kleef for her refusal to work the compulsory weekday overtime was in breach of s 67F(2)(b) of the Act. Section 103(1)(i) of the Act makes clear that a personal grievance includes a grievance that the employee’s employer or former employer has contravened s 67F. This means that the dismissal of Ms van Kleef was unjustified, entitling her to remedies. The test of justification under s 103A does not apply to s 103(1)(i).

[85] I do not agree that Ms van Kleef was obliged to raise her refusal to work in terms of a non-compliant availability clause. She was essentially unrepresented for most of the time she was arguing her case, prior to dismissal, and it is likely that she only became aware of the legal requirements in respect of compulsory overtime provisions after her dismissal. The respondent was far better resourced than Ms van Kleef, with its own legal counsel.

[86] In order to quantify the remedies due to Ms van Kleef, it is necessary to consider a number of issues. These are:

- a. Lost wages under s 123(1)(b) and 128 of the Act;
- b. Compensation under s 123(1)(c)(i) of the Act;

- c. Loss of the benefits of 15 years' seniority under s 123(1)(c)(ii) of the Act. (I refer to clauses 34 and 54 of the collective);
- d. "Loss of savings" claimed by Ms van Kleef;
- e. Contribution under s 124 of the Act.

[87] It was decided during the investigation meeting that determining remedies would need further evidence, and so these issues will be addressed separately after that further evidence has been considered.

[88] However, I will address here the proposition that Ms van Kleef floats that she may be entitled to a payment of redundancy compensation. Clause 54 of the collective agreement states that "the Alliance Freezing Company Redundancy Agreement dated 6 June 1990" and the "provisions contained in section 184A of the Labour Relations Act 1987" apply to workers covered by the agreement.

[89] The Redundancy Agreement has not been supplied to the Authority, although Ms van Kleef included an extract of s184A of the 1987 Act in her submissions, which included a definition of redundancy, being where the termination is attributable wholly or mainly to the fact that the position filled by the worker is or will become superfluous to the needs of the employer.

[90] However, Ms van Kleef was clearly not dismissed for redundancy in accordance with that definition, as she was replaced in her position which continued, and so there can be no presumption that she would be entitled to compensation for redundancy arising out of her dismissal.

[91] Furthermore, whilst she will have lost the benefits of seniority by having been dismissed, for which compensation may be available, she has only lost the right to a redundancy compensation payment in the event that, had she not been dismissed, she may later have been made redundant.

Was Ms van Kleef prevented from taking rest and meal breaks contrary to her statutory and contractual rights?

[92] The provisions in the Act relating to rest breaks provide as follows:

69ZC Interpretation

In this Part, unless the context otherwise requires,—

compensatory measure—

(a) means a measure that is designed to compensate an employee for a failure to provide rest breaks or meal breaks in accordance with section 69ZD(1); and

(b) includes (without limitation) a measure that provides the employee with time off work at an alternative time during the employee's work period, for example, by allowing a later start time, an earlier finish time, or an accumulation of time off work that may be taken on 1 or more occasions

work period—

(a) means the period—

(i) beginning with the time when, in accordance with an employee's terms and conditions of employment, an employee starts work; and

(ii) ending with the time when, in accordance with an employee's terms and conditions of employment, an employee finishes work; and

(b) to avoid doubt, includes all authorised breaks (whether paid or not) provided to an employee or to which an employee is entitled during the period specified in paragraph (a).

69ZD Employee's entitlement to rest breaks and meal breaks

(1) An employee is entitled to, and an employer must provide the employee with, rest breaks and meal breaks that—

(a) provide the employee with a reasonable opportunity, during the employee's work period, for rest, refreshment, and attention to personal matters; and

(b) are appropriate for the duration of the employee's work period.

(2) The employee's entitlement to rest breaks and meal breaks may be subject to restrictions, but only if the restrictions—

(a) are—

(i) reasonable and necessary, having regard to the nature of the employee's work; or

(ii) if subparagraph (i) does not apply, reasonable and agreed to by the employer and employee (whether in an employment agreement or otherwise); and

(b) relate to 1 or more of the following:

(i) the employee continuing to be aware of his or her work duties or, if required, continuing to perform some of his or her work duties, during the break:

(ii) the circumstances when an employee's break may be interrupted:

(iii) the employee taking his or her break in the workplace or at a specified place within the workplace.

(3) An employee's entitlement to rest breaks under this section is to paid rest breaks.

69ZE Timing and duration of rest breaks and meal breaks

(1) An employee must take his or her rest breaks and meal breaks—

(a) at the times and for the duration agreed between the employee and his or her employer; but

(b) in the absence of such agreement, at the reasonable times and for the reasonable duration specified by the employer.

(2) For the purposes of subsection (1)(b), an employer may specify reasonable times and durations that, having regard to the employer's

operational environment or resources and the employee's interests, enable the employer to maintain continuity of service or production.

(3) An employer must provide an employee with a reasonable opportunity to negotiate with the employer and reach agreement under subsection (1)(a) on the times when the employee's rest breaks and meal breaks are to be taken and on the duration of the breaks.

(4) To avoid doubt, subsection (3) does not limit the requirement of the employer and employee to deal with each other in good faith as set out in section 4.

69ZEA Compensatory measures

(1) An employer is exempt from the requirement to provide rest breaks and meal breaks in accordance with section 69ZD(1)—

(a) to the extent that the employer and the employee agree that the employee is to be provided with compensatory measures; or

(b) if paragraph (a) does not apply, only to the extent that, having regard to the nature of the work performed by the employee, the employer cannot reasonably provide the employee with rest breaks and meal breaks.

(2) To the extent that an employer is not required to provide rest breaks and meal breaks under subsection (1), an employee is entitled to, and the employer must provide the employee with, compensatory measures.

69ZEB Compensatory measure must be reasonable

(1) A compensatory measure provided to an employee under section 69ZEA must be reasonable.

(2) To avoid doubt, if an employer provides an employee with a compensatory measure that involves time off work at an alternative time during the employee's work period, that measure is to be treated as complying with subsection (1) if—

(a) the employee is provided with an equivalent amount of time off work (that is, the same amount of time that the employee would otherwise have taken as a rest break or meal break); and

(b) the time off work at an alternative time is provided on the same basis as the rest break or meal break that the employee would have otherwise taken.

69ZF Penalty

An employer who does not comply with any of sections 69ZD to 69ZEB is liable to a penalty imposed by the Authority.

69ZG Relationship between Part and employment agreements

(1) This Part does not prevent an employer from providing an employee with enhanced or additional entitlements to rest breaks and meal breaks (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.

(2) An employment agreement that excludes or reduces an employee's entitlement to rest breaks and meal breaks under section 69ZD(1) or (3) or 69ZE or to compensatory measures under section 69ZEA—

(a) has no effect to the extent that it does so; but

(b) is not an illegal contract under subpart 5 of Part 2 of the Contract and Commercial Law Act 2017.

(3) An employment agreement that restricts an employee's rest breaks or meal breaks otherwise than in accordance with section 69ZD(2)—

(a) has no effect to the extent that it does so; but

(b) is not an illegal contract under subpart 5 of Part 2 of the Contract and Commercial Law Act 2017.

69ZH Relationship between Part and other enactments

Where an employee is a person who is required to take rest breaks or meal breaks by, or under, an enactment other than this Part, the requirement for rest breaks or meal breaks defined by, or under, the other enactment applies instead of this Part.

[93] The collective agreement, at clause 6, contains the following material provisions in relation to rest breaks:

(b) Provided that two hours work has been performed since commencing work or since a meal interval, as the case may be, an interval of 15 minutes for all workers shall be allowed for rest periods each morning and afternoon, and when working overtime and on shifts at intervals of approximately two hours. When work is continued for more than half an hour after the ordinary time of ceasing work, the rest period shall be allowed on the expiration of two hours from the rest period in ordinary time. No rest break is allowable upon cessation of work either in ordinary time or overtime.

(c) Payment for rest periods shall be deemed to be incorporated into rates of pay.

(d) In the event of an unscheduled interruption to processing, due to breakdown, the company may, where practicable, over the rest period up to 15 minutes either side of the scheduled time.

[94] The P5 room agreement states at clause 4.3 as follows:

Where a worker works a normal day that worker will be entitled to an unpaid meal break of 30 minutes. Provided that two hours work has been performed since commencing work or since a meal interval, as the case may be, 15 minutes shall be allowed for unpaid rest periods each morning and afternoon and when working on shifts on shifts of approximately two hours.

[95] The actual rest breaks to which Ms van Kleef and her co-workers in P5 were entitled at the time of her dismissal were as follows:

- a. From 07.30, four minute micro-break;
- b. From 08.35, four minute micro-break;
- c. From 09.40, twenty minute smoko break;
- d. From 10.55, four minute micro-break;

- e. From 12.00, thirty minute lunch-break;
- f. From 13.35, four minute micro-break; and
- g. From 14.45, fourteen minute break.

[96] When doing the end of weekday overtime, workers would also get another four minute micro-break as part of the 30 minute work period. The micro-breaks were four minutes each, instead of five, so as to allow for 20 minutes morning smoko.

[97] Ms van Kleef's evidence was that she would regularly lose up to seven minutes of her rest break per day, and sometimes up to 15 minutes per day due to three issues:

- a. Processing delays further up the chain;
- b. Equipment breakdowns, and
- c. The removal of her PPE after leaving the P5 room, and putting it back on again before re-entering the room (called, for convenience, 'donning and doffing')³.

[98] Ms van Kleef's evidence, and that of her co-worker, Rowan Smith, was compelling and leads me to conclude with little room for doubt that the start of Ms van Kleef's rest breaks would be regularly delayed, so that she would not be able to leave her workstation until several minutes after the official start time. Indeed, the respondent accepts this, but argues that Ms van Kleef would usually ensure she returned from her break 'late' by the same margin as she had left for the break. I do not accept this, however. This is because of the way that the process worked.

[99] Ms van Kleef worked near the end of the chain, packing the cuts of meat that were being produced further up. At 09.40, the workers at the start of the chain would stop their work, but the final pieces of meat would still have to make their way down the belt. By the time they reached where Ms van Kleef worked, around three minutes had elapsed. However, if there were snags in the process further up, backlogs would be created, and Ms van Kleef (and her co-workers in her area) would be unable to

³ A term which is used specifically in the context of rest break encroachment in the meat working industry following two decisions of the Supreme Court of the United States of America, *Steiner v Mitchell* 350 US 247 (1956) and *Mitchell v King Packaging Co* 350 US 260 (1956).

leave their area until she had dealt with all the meat coming her way. Only in exceptional circumstances, it seems, would a supervisor step in and let the workers leave.

[100] The reason why Ms van Kleef did not leave her break ‘late’ by an equivalent amount of delay by which she had started her break was because she knew that the meat would be reaching her area around three minutes after the break officially ended, and that, as the production at the start of the chain had only just restarted, the chances of snags delaying the arrival of the meat were slim. Therefore, if she did get back late, there would be a large number of pieces of meat waiting for her to weigh and pack, with more meat arriving continuously. This would cause stress and, in the words of Ms Smith, “chaos”.

[101] Therefore, Ms van Kleef did not get the 15 minutes of rest that she was entitled to. This is the case even if one counts travel to the canteen and back again as ‘rest’, as is submitted by Mr Farrow, although I do not make any findings on that at this stage.

[102] I also accept that, on a less frequent basis, Ms van Kleef would have lost some of her rest break time due to equipment breakdowns that impinged upon the flow of product down to her area. This is really a subset of the first type of cause.

[103] In relation to donning and doffing, Ms van Kleef says that she lost time because she both had to doff (take off) and deposit her PPE, and re-don it on her way back to room P5. Sometimes she had to search for gloves, or other items, which took longer for her to get back. She also chose to wear an ‘overcoat’ because of the cold, whereas some other workers did not.

[104] The issue of donning and doffing is a complex one, as not all of the ‘gear’ that Ms van Kleef wore was PPE, and it is arguable that dealing with this gear was not work. For the current purposes of establishing liability for encroachment, I am satisfied that there was material encroachment into Ms van Kleef’s rest breaks for other reasons without having to decide whether donning and doffing contributed.

[105] I note also that there are proceedings currently before the Employment Court⁴ in which the question of donning and doffing, and the effect of it on workers' rights under Part 6D of the Act and the Minimum Wages Act 1983, is going to be examined. There is a strong argument for awaiting the Employment Court's substantive judgement in this matter before the Authority addresses the question in Ms van Kleef's matter.

[106] Quantifying Ms van Kleef's loss in respect of encroachment is clearly a complex matter requiring further evidence and submissions. That further enquiry will include consideration of Part 6D of the Act and the respondent's obligations under that Part.

Conclusion

[107] I find that Ms van Kleef was frequently unable to take her rest breaks for the entire duration that had been agreed between the union on behalf of Ms van Kleef and the respondent; namely, 20 minutes, 30 minutes and 14 minutes per day respectively. This means that the respondent has also acted in breach of s 69ZE(1) of the Act. No compensatory measures were expressly agreed between the respondent and Ms van Kleef in relation to her lost time, although s 69ZE does not expressly provide for that option in respect to a failure to comply with s 69ZE(1) in any event.

[108] In terms of the remedies that are due to Ms van Kleef in respect of such encroachments, it is necessary to consider a number of sub issues raised by the parties:

- a. Is sufficient evidence available to enable the parties and the Authority to calculate the extent of the loss of rest break time for each day on which encroachment occurred, back to 27 October 2011⁵?
- b. In calculating the loss of rest break time for each day on which encroachment occurred, to what extent is time spent donning and doffing to be included?

⁴ *Ovation New Zealand Limited and Te Kuiti Meat Processors Limited v The New Zealand Meat Workers and Related Trades Union Incorporated* [2018] NZEmpC 82.

⁵ The date which is six years prior to the date when Ms van Kleef lodged her application in the Authority.

- c. To what extent did the micro-breaks, and other ad hoc breaks constitute compensatory measures in terms of s 69ZEA of the Act, insofar as compensatory measures are applicable to a breach of s 69ZE?
- d. Is Ms van Kleef entitled to be paid at an overtime rate for the time lost each day on which encroachment occurred?
- e. Is Ms van Kleef entitled to compensation pursuant to s 123(1)(c)(i) of the Act in relation to not being able to take her full rest break entitlements?

[109] These issues will therefore be considered at a separate investigation meeting.

[110] Ms van Kleef argues that she worked longer than other workers for the same pool money. However, this is, I believe, the same argument that she was not paid sufficiently for the work she did as a result of encroachment.

Did Ms van Kleef suffer unjustified disadvantage in her employment caused by various unjustified actions of the respondent?

[111] There are a number of such claims, as follows:

- a. Being disadvantaged by the respondent not following up on her complaints about encroachment;
- b. Taking four months to respond to Ms van Kleef's letter of 28 October 2016;
- c. Ms van Kleef's suspension;
- d. Inadequate notice given of first meeting;
- e. Issued with a first written warning;
- f. Failing to assure Ms van Kleef's health and safety (alternatively, this is a breach of contract claim);
- g. Misleading Ms van Kleef about the purpose of the 0.5% pay increase;

- h. The alleged failures in relation to the provision of documents to Ms van Kleef;
- i. Misleading Mr Lovely, which in turn disadvantaged Ms van Kleef;
- j. Not notifying Ms van Kleef that overtime had become compulsory;
- k. Not informing Ms van Kleef of the meeting between the union representatives and Mr Park about stopping the room.

[112] In her evidence and submissions Ms van Kleef expresses dissatisfaction with the way she was treated by the union, and by Mr Latimer. However, only Alliance Group Limited has been cited as a respondent and so I cannot consider these complaints against her former union.

[113] The personal grievance of unjustified disadvantage is defined in s 103(1)(b) of the Act, as follows:

103(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—

...

(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[114] In *Downer New Zealand Limited v Garry Jones*⁶ His Honour Judge Smith summarised the current understanding by the Courts of the meaning of s103(1)(b), drawing on previous case law, as follows⁷:

[104] ... In *ANZ National Bank Ltd v Doidge*, the Court analysed the meaning of s 103(1)(b) where that section refers to conditions of the employee's employment being affected to the employee's disadvantage. In that case the Court concluded the section was not confined to breaches of contract because a personal grievance is a broader notion. Some aspect of an arrangement between an employer and an employee could, therefore, be a "condition" of employment while not being a term of the contract. By way of explanation, the Court held that not everything an employer provides, or an employee expects to receive, during employment is either a term or a condition of the agreement between them.

⁶ [2018] NZEmpC 77, at [104] et seq.

⁷ Case references omitted.

[105] The Court in *Doidge* had drawn on the Court of Appeal's decision in *Tranz Rail Ltd v Rail & Maritime Transport Union Inc.* In the context of discussing a bonus scheme, the Court of Appeal commented that a term of employment as a concept is necessarily wider than the term of an employment contract. In *Doidge* the Court decided a mileage allowance previously paid to a casual employee, which was not a term of the employment agreement, was a condition of employment so a claim under s 103(1)(b) was available. In that case, however, the unilateral withdrawal of the mileage allowance was not an unjustified action and no remedies were available.

[115] This is the background against which Ms van Kleef's disadvantage claims must be assessed.

Were personal grievances raised in time?

[116] Mr Farrow submits that Ms van Kleef did not raise a personal grievance about ten of the alleged actions giving rise to disadvantage in her employment within the statutory 90 days required by section 114 of the Act. He says that a letter from Ms van Kleef dated 10 April 2017⁸ did not raise personal grievances, as she stated in that letter that she *intended* to raise a personal grievance. What she stated, specifically, was:

Please be advised that I intend to raise a personal grievance, constructive dismissal over my treatment on this matter.

[117] When Ms van Kleef wrote this letter, she was still employed, and was still trying to obtain copies of the current room agreement, collective agreement, plant variation agreements and documentation regarding a 0.5% pay rise which she believed at the time was paid in exchange for workers dropping an encroachment claim. She then set out a history of events as she saw them, and named a number of issues that caused her concern about her working conditions.

[118] Ms van Kleef's statement, replicated above, is therefore confusing at first sight because, when she wrote the letter she had not resigned (an essential element upon which a constructive dismissal claim is predicated). However, her letter seems to be saying that she was preparing, or planning to resign and claim constructive dismissal because of the issues she then goes on to ventilate.

⁸ Handed in to the respondent on 13 April 2017.

[119] Whilst the letter does not raise expressly a request to the respondent that it address each of the issues she had stated in her letter, it can clearly be inferred from it that she was complaining about them, and would resign if they were not addressed. The key issue she was complaining about, encroachment, was very much a live issue.

[120] On balance, I believe that it is sufficiently clear from the letter that Ms van Kleef was complaining about the issues listed in the letter, and that she expected them to be addressed, or she would resign. This letter therefore raised a personal grievance about the issues in it.

Being disadvantaged by not following up on her complaints about encroachment

[121] This complaint was raised by Ms van Kleef in her letter of 10 April 2017. It is allied with a separate claim that the respondent unfairly separated overtime issues from other issues raised by Ms van Kleef.

[122] The approach taken by the respondent was that Ms van Kleef's complaints of encroachment had to be pursued via 'the proper channels'. That is, she could only pursue them through the union. However, it appears that the union were not keen to take up the cudgels on her behalf, at least not in the immediate future. I do not adversely judge the union for this; the issue of encroachment is a complex one that potentially affects meat workers in plants country-wide, and I suspect that the union believed that it needed to be addressed in a co-ordinated way. Indeed, there are now proceedings before the Employment Court in relation to aspects of alleged encroachment, such as donning and doffing (see footnote 4 above).

[123] Nonetheless, Ms van Kleef had a right to take rest breaks pursuant both to the Act and to the collective agreement. The collective agreement not only provided for collective rights and obligations, but rights for each individual employee too.

[124] I do not underestimate the difficulty faced by an employer when an individual complains of breaches to her rights arising out of practices which affect a number of workers, when the union does not support the individual's grievance. However, the respondent owed a duty of good faith to Ms van Kleef to investigate her complaints, whether or not they were supported by the union.

[125] However, I note that, in the letter from Mr Byrne to Mr Lovely dated 6 April 2017, drafted by Mr Kenneth Smith, legal counsel at Alliance Group Limited, Mr Byrne stated:

If the union do not support your client, this is not fatal to her continuing to pursue the matter with the company management but the process requires good faith from both parties and a commitment to rational discourse rather than unilateral protest action.

[126] In other words, the respondent expressly offered an opportunity for Ms van Kleef to pursue the matter of encroachment with the respondent company if the union did not support Ms van Kleef.

[127] It is impossible to know what would have happened if Ms van Kleef had agreed to work the overtime, and had asked management to investigate her encroachment concerns, but on the face of it, the offer made in Mr Byrne's letter was made in good faith.

[128] It is my finding that the respondent wanted to persuade Ms van Kleef to separate out the issue of encroachment from the requirement to work overtime, and that it would investigate her complaints once she had done that. That position was not unreasonable given the clear agreement between the parties of the collective agreement that reasonable compulsory overtime would be worked when required by the respondent from time to time. At that stage, Ms van Kleef was not arguing that she was entitled to refuse to do overtime pursuant to s 67E of the Act.

[129] In conclusion, I find that the respondent did not refuse to investigate the encroachment issue, but that Ms van Kleef's dismissal prevented the respondent from doing so.

Taking four months to respond to Ms van Kleef's letter of 28 October 2016

[130] Ms van Kleef says that, when no-one acknowledged her letter, she understood that the respondent was not going to address the problems of break losses, but were allowing her compensatory time off instead, which she was happy with, and so she stopped documenting break losses and dating the ones she had documented. This was a disadvantage that flowed from the failure to acknowledge her letter she says. One of the issues raised in Ms van Kleef's letter of 10 April 2017 was the length of time taken to reply to her letter of 28 October 2016.

[131] However, I do not accept that there was a disadvantage in Ms van Kleef's employment, or one or more conditions of it, caused by the respondent taking four months to acknowledge her letter. The cited disadvantage was caused by Ms van Kleef jumping to a conclusion that she was being given compensatory time off and deciding of her own volition to stop recording the encroachments. Whilst frustrating, perhaps, waiting four months to acknowledge her letter was not a disadvantage to Ms van Kleef in itself.

[132] I am also not convinced that the action of the respondent in not acknowledging the letter was unjustified. Mr Park deposed in an affidavit that he never received the letter from Ms van Kleef dated 28 October 2016 and only became aware of it in 2017 when he attended meetings with her as a note taker. Mr Park was overseas and unable to be questioned by the parties or the Authority.

[133] The evidence given during the Authority's investigation meeting was that Ms van Kleef had passed her letter onto a P5 room supervisor called Bonita Chellew. Ms Chellew agreed that this had happened and she said that she had given the letter to another supervisor, Mark Attewell. However, Mr Attewell said in evidence that he had only seen the letter after it had been given to a senior supervisor, Peter McLeod.

[134] Mr McLeod's evidence was that he got the letter from Ms van Kleef "eventually", and that he put it on Ms van Kleef's file. Mr McLeod said that the letter never went to Mr Park.

[135] It appears that there is some confusion as to what happened to the letter but I am prepared to accept on a balance of probabilities that, by the time it was seen by Mr McLeod in early November 2016, the respondent was no longer requiring workers in P5 to work weekday overtime and so Ms van Kleef's letter was not immediately relevant. That is probably why it was put on her file and not given to Mr Park.

[136] I am satisfied that there was no deliberate decision taken by the respondent not to action Ms van Kleef's letter. I believe it was seen by Mr McLeod as a notice that she was not going to be working overtime, but as overtime was just about to cease, or had just ceased, he did not see a need to action it.

[137] Ms van Kleef's letter also complains of encroachment. It is possible that, had the respondent actioned the letter instead of filing it, it would have addressed the

encroachment issue, and avoided Ms van Kleef's eventual dismissal. However, the actions that followed in February to April 2017 show that this would have been unlikely. The respondent's firm view, until Mr Byrne's letter of 6 April 2017, was that Ms van Kleef should have been pursuing her concerns about encroachment through the union. It is very likely that it would have adopted the same approach in November 2016.

[138] Therefore, in conclusion, I do not accept that the respondent's failure to action the letter in November 2016 caused Ms van Kleef an actionable disadvantage in her employment.

Ms van Kleef's suspension

[139] Mr Farrow does not argue that a personal grievance was not raised in time in respect of this issue. Ms van Kleef was unable to explain what disadvantage had been caused to her by being asked to stay at home to enable her to read the documents she had been given prior to the meeting the following week. All she could say was that it was not necessary to suspend her to read the documents.

[140] As Ms van Kleef was paid during this suspension, and as there was no disciplinary aspect to it, I cannot agree that Ms van Kleef suffered any disadvantage in her employment or the conditions of her employment in being suspended. Indeed, her evidence emphasised the physically demanding nature of her job, and she was essentially given an extra paid day off. I decline to find she was unjustifiably disadvantaged.

[141] I do not accept Ms van Kleef's argument that she was suspended pursuant to s 87 of the Act, as she was not a striking employee.

Inadequate notice given of first meeting

[142] This matter was raised by Ms van Kleef in her letter of 10 April 2017. It appears that it is common practice for the respondent to call employees to a meeting with little notice, but enable them to see the union delegate first. It is not clear whether this happens in formal disciplinary settings, and I will not comment on this practice save insofar as it affected Ms van Kleef on this particular occasion, 22 February 2017.

[143] Ms van Kleef said that she did not have her paperwork with her regarding encroachment when she was called into the meeting on 22 February 2017. The minutes of the meeting showed that Mr Docherty told Ms van Kleef that she was required to work the requested overtime “or she would be putting her job at risk through the disciplinary process”. That was effectively an oral warning, and it is disingenuous to try to characterise this meeting as an investigation meeting. It was clearly disciplinary in nature.

[144] Whilst it is unlikely that Ms van Kleef would have been able to have persuaded Mr Docherty that she should not be forced to work weekday overtime had she had her paperwork with her, she was still disadvantaged by not being given the opportunity to do so with the support of her paperwork, and in being called into a disciplinary meeting with almost no notice. She was also disadvantaged by not being able to fully inform her union representative, Mr Latimer, of her position by being given so little notice.

[145] Having found that Ms van Kleef was disadvantaged by inadequate notice, I also find that it was unjustified, as no fair and reasonable employer in all the circumstances could have expected Ms van Kleef to have answered questions in a disciplinary meeting about her refusal to work overtime with such little notice that she was unable to retrieve her papers.

Issued with a first written warning

[146] Mr Farrow does not argue that a personal grievance was not raised in time in respect of this issue. The respondent issued Ms van Kleef with a first written warning for failing to follow a lawful and reasonable instruction, namely, refusing to work overtime. I believe the respondent was correct to wish to separate out the contractual obligation to work overtime from the encroachment issue. However, I have also found that the collective agreement did not comply with s 67D of the Act, and that Ms van Kleef was entitled to refuse to perform overtime pursuant to s 67E.

[147] Section 67F(1) provides that an employer must not treat adversely an employee who refuses to perform work under s67E. 67F(2)(b) provides that an employer treats an employee adversely if the employer dismisses or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or

subjected to such detriment. This is materially the same wording as the description of discrimination in s 104 of the Act.

[148] This definition requires the identification of a comparator whose circumstances are materially identical to those of Ms van Kleef, save for the protected characteristic upon which the unlawful treatment is based⁹. An example from discrimination law may be one where a person who is disabled is dismissed or treated adversely in circumstances where another employee whose circumstances are materially identical, save for the disability, would not be dismissed or treated adversely.

[149] In Ms van Kleef's case, the comparator is a worker doing the same work as her who did not refuse to work overtime, as the protected characteristic is refusing to work overtime pursuant to s 67E of the Act. Clearly, Ms van Kleef was subjected to the disadvantage of being given a first written warning for that refusal. Other workers were not.

[150] Being issued with a first written warning was clearly a detriment, taking into account the definition in s 67F(3), and it was issued in circumstances where other workers would not have been subjected to such a detriment. It was therefore an unjustified action contrary to s 67F and s103(1)(i) of the Act.

Failing to assure Ms van Kleef's health and safety

[151] Ms van Kleef expresses this claim as breaches of clauses 2 and 18 of the collective agreement. She seeks penalties to be imposed as a result of the alleged breaches. Clause 2 states, inter alia, that the intention of the collective agreement is to "safeguard the safety, health and welfare of the workers". Clause 18 provides:

18 **Health and Safety**

- (a) The parties to this agreement are committed to excellence in health and safety management in the workplace.
- (b) To achieve this common goal of zero workplace accidents and illnesses the parties commit to work together in a spirit of good faith.
- (c) As a minimum standard, the parties agree to comply with the Health and Safety in Employment Act 1992 and all regulations and codes of practice and guidelines made pursuant to the Act (and

⁹ See Tipping J's succinct commentary in *McAlister v Air New Zealand Ltd* [2009] NZSC 78; [2010] 1 NZLR 153; at [52].

any subsequent amendments) as well as any other legislation relevant to the health and safety in the workplace.

(d) The parties accept that promotion of good health and safety practice is preferable to dealing with accidents and illnesses.

(e) The parties accept that agreed and sustainable rehabilitation is important to ensuring any injured person returns to work.

(f) Elected Health and Safety representatives that are recognised by the company shall receive a weekly payment of \$10.50 while employed. The company will determine the number of Health and Safety representatives on each site in consultation with the employee's representative.

[152] Ms van Kleef asserts that the encroachment into her rest breaks constituted a breach of these clauses and of the respondent's duties under the Health and Safety at Work Act 2015 which are incorporated into the collective agreement. These include, at s 36 of the 2015 Act, a duty to ensure, as far as reasonably practicable, the provision of a work environment that is without risks to health and safety and the provision of safe systems of work. Ms van Kleef also refers to the duties at s 30 of the 2015 Act in relation to the management of risks.

[153] Whilst I accept that there is the potential for the respondent's duties to Ms van Kleef to have been breached by the encroachment into her rest breaks, I am not able to find with any certainty that this was the case. Encroachment into break times does not necessarily lead to a breach of the respondent's duties under health and safety legislation, and further enquiry into the extent of such encroachment over time, and the probable cumulative effects of that encroachment, would have to be made.

[154] There is also no evidence that the encroachment into her rest breaks that Ms van Kleef suffered directly caused her to suffer occupational overuse syndrome, referred to in Ms van Kleef's submissions, or other adverse effects. The accident report submitted by Ms van Kleef for 24 November 2016 indicated injury possibly caused by her having to 'double up', and through inadequate ergonomic factors, rather than not having her full breaks. A list of 'room problems' included in the submissions by Ms van Kleef point to frequent equipment break downs, shortages of boxes, liners and so forth, and staffing issues. It is not possible to know whether these problems caused health issues for Ms van Kleef or in turn led to rest break impingement.

[155] It may be that there is research available into the minimum amounts and lengths of daily rest breaks needed to be taken by various categories of meat worker to avoid injury, but such research has not been drawn to my attention. I accept that packing can be associated with high risk factors for strains and sprains, but would

need further information about the minimum daily breaks needed to ward off such risks before I can reach any reasonable conclusion as to whether Ms van Kleef's rights under the health and safety provisions of the collective agreement have been breached by the encroachment she claims to have suffered. Furthermore, the Authority has not yet determined the extent of the encroachment, which it will have to do to determine what remedies Ms van Kleef is owed.

Misleading Ms van Kleef about the purpose of the 0.5% pay increase

[156] Ms van Kleef alleges that she was misled into thinking that the respondent and the union had agreed a 0.5% pay rise for the workers to compensate them for having their breaks encroached.

[157] It is not clear to me that Ms van Kleef has raised a personal grievance about this issue within the statutory time limit, as the letter of 10 April 2017 appears to show that Ms van Kleef still believed that such a pay rise had been received for encroachment issues. However, in any event, I do not find that Ms van Kleef has suffered an unjustified disadvantage in this respect even if she had raised a valid personal grievance.

[158] Mr Kenneth Smith gave evidence about a settlement agreement that had been reached between the union and Alliance with respect to payment for rest breaks in 2012. This related to a change in the legislation on 1 April 2009 requiring employers to pay employees for their rest breaks. In 2011 the union had lodged a claim in the Authority claiming that the company was not complying with its statutory obligations in relation to some workers who were paid on a piece rate basis.

[159] It appears that the dispute was settled by the payment of 0.5% pay rise to workers and the union accepting a clause in the collective agreement which stated that "payment for rest breaks shall be deemed to be incorporated into the rates of pay". Therefore, this 0.5% payment was not to do with the encroachment of activities into rest breaks but to settle pay claims in respect of a change in the law requiring rest breaks to be paid.

[160] Ms van Kleef says that it was Mr Latimer who told her that the union had agreed a 0.5% pay rise to compensate for encroachment, and that another union official was evasive. She says that when she later queried the 0.5% pay rise with the

respondent, Mr Byrne did not know anything about it and Mr Docherty, on a separate occasion, said he thought the pay rise had been something to do with the Holidays Act. Ms van Kleef later found out separately what the 0.5% pay rise was really for.

[161] First, the respondent cannot be held liable for the actions of Mr Latimer. I am satisfied that he was interacting with Ms van Kleef in his capacity as a union official, not a representative of the respondent. Second, I do not find that there is any cogent evidence that the respondent deliberately tried to mislead Ms van Kleef about the 0.5% pay rise during her discussions with it. I believe that Mr Docherty and Mr Byrne simply did not know, or had forgotten what the purpose of the pay rise had been.

[162] I note that Mr Docherty stated in his letter to Ms van Kleef dated 24 April 2017, confirming her dismissal, that he stated that she was informed “...that the issue of encroachment of breaks was resolved by the company and union during collective bargaining a number of years ago”. This is a surprising statement given that, by then, Mr Docherty should have found out what the 0.5% pay rise had been for. However, that statement was contained in a letter which was sent after the dismissal had taken effect.

[163] Furthermore, I am not satisfied that statements about the 0.5% pay rise made by Mr Docherty prior to Ms van Kleef’s dismissal caused a disadvantage in her employment or conditions of her employment, as they did not result in her dropping her encroachment arguments, or otherwise altering her position.

The alleged failures in relation to the provision of documents to Ms van Kleef

[164] This is a matter raised by Ms van Kleef in her letter dated 10 April 2017. Ms van Kleef here refers to not being given a copy of the up to date collective agreement, or the room agreement, until she was suspended (four days before her dismissal). She also refers to not being given sufficient information to enable her to understand how her pay was broken down.

[165] Ms van Kleef says that Mr Byrne told Mr Lovely on 21 March 2017 that the new collective agreement was still undergoing ratification when it had already been ratified in December 2016, and settled on 22 February 2017. She says also that she

was told to work out for herself her pay increases, having been given a list of 2011 pay rates and a list of pay rises.

[166] First, I agree with Mr Farrow that failings by the union, or Mr Latimer to let Ms van Kleef have copies of the collective agreement cannot be laid at the door of the respondent. I am also of the view that failures by the respondent to let Ms van Kleef have copies of documents earlier than it did were not borne out of an intention to disadvantage her. In any event, Ms van Kleef was given copies of the documents she had been seeking sufficiently prior to the final disciplinary meeting to enable her to read and consider them. Indeed, she complains that she was suspended in order to give her time to read them.

[167] I do not find therefore that the respondent's actions in respect of the provision of documents unjustifiably disadvantaged Ms van Kleef.

Misleading Mr Lovely, which in turn disadvantaged Ms van Kleef

[168] Mr Lovely gave evidence to the Authority. Ms van Kleef had refused to waive legal professional privilege with respect to certain communications between her and Mr Lovely so his evidence was somewhat restricted. However, I am satisfied that he was able to answer questions with sufficient clarity for me to be able to conclude that he was not misled by the actions of the respondent so as to materially disadvantage Ms van Kleef in her employment. Mr Lovely accepted that he had the information he needed to enable him to act appropriately for Ms van Kleef.

[169] In addition, I note that in his email from Mr Byrne to Mr Lovely dated 21 March 2017 Mr Byrne expressly stated that he was sending a copy of the old collective agreement. In such a case, Mr Lovely cannot have been misled as he was told he was not being sent the latest version of the agreement. Furthermore, in the version he was sent, the overtime clause was the same as the current collective agreement.

[170] I therefore do not agree that this claim is made out.

Not notifying Ms van Kleef that overtime had become compulsory.

[171] I shall consider this allegation along with the allegation that Ms van Kleef was treated differently from other workers for whom overtime was not compulsory, as Ms van Kleef appears to have conflated the two arguments in her submissions.

[172] Ms van Kleef says that she was discriminated against because she was subject to compulsory overtime and others were not. I infer that she is referring to disparity of treatment rather than discrimination pursuant to s 104 of the Act. It is not clear that Ms van Kleef has raised this complaint within the statutory 90 day time period. However, I do not find it has been made out in any event.

[173] Ms van Kleef says that overtime was not always compulsory, and refers to certain workers being excused from working on Saturdays. I infer that these are workers who identify as Seventh Day Adventists. In such a case, there would be a justification in not requiring those workers to work on a Saturday as they would have genuine reasons, based on their religious beliefs, for not doing so. In fact, it would be arguably unlawful to require them to do so. That difference in treatment did not disadvantage Ms van Kleef, or if it did, it was not unjustified.

[174] In addition, witnesses for the respondent explained that the respondent considered requests not to work overtime on specific days on a case by case basis. It is clear that there would be times when workers could not be available to work overtime because of prior commitments, and excusing overtime on specific occasions does not mean that overtime was not compulsory for those workers. It simply means that the respondent exercised discretion in the exercise of the compulsory overtime.

[175] Furthermore, I agree with Mr Farrow that it was clear that there was a requirement to work compulsory overtime in the collective agreement. This was not a new requirement. Also, I consider that the respondent could reasonably have expected the union to have advised its members of the contents of the latest collective agreement at the point of ratification.

[176] Therefore, I do not accept the contention that overtime was not compulsory, and then suddenly became compulsory without notice. Rather, it was expressly compulsory in the collective agreement, but the respondent chose not to force every employee to work overtime on every occasion.

Not informing Ms van Kleef about the meeting between the union representatives and Mr Park on 22 February 2017

[177] This meeting was one held between Mr Park and union representatives to discuss Ms van Kleef's suggestion that the entire room be stopped to enable everyone to have a break at the same time. During this meeting, one of the representatives said that Ms van Kleef did not miss out on her breaks because she would return from her breaks late. This was only discovered by Ms van Kleef on 27 March 2017. Ms van Kleef says that it was a disadvantage not to have notified her of the meeting and the comments.

[178] First, I do not accept that the respondent was obliged to have told Ms van Kleef about the meeting prior to it taking place. However, it should have advised Ms van Kleef of the outcome of the investigation as soon as it reasonably could, and according to Mr Docherty's note of the meeting on 22 February 2017, it was decided then and there that the proposal to stop the room would not be taken any further. However, it does not appear that Ms van Kleef was advised of that decision during a meeting with her the following day. Nor was she told of the comment of the union representative that she came back from her breaks late. Despite this omission, she was issued with a first written warning by Mr Byrne.

[179] It is likely that Mr Byrne will have been told by Mr Docherty or Mr Park about the comment by the union representative, and had it in his mind when he issued the first written warning. Had Ms van Kleef been aware of the comment, she could have denied it and argued her case. Therefore, by not being told about the comment, she suffered a disadvantage in her employment, which was unjustified.

Was Ms van Kleef underpaid by reference to various rights in the collective agreement and the P5 room agreement?

[180] During the investigation meeting Ms van Kleef asserted that she has been underpaid in relation to the following:

- a. Induction pay;
- b. Clause 8(g) of the Collective Agreement (shift allowance); and

- c. Clause 4(h) of the Collective Agreement (minimum of an hour's pay for working overtime); and
- d. Clause 5.2 of the room agreement (step-up kill overtime).

[181] In addition, Ms van Kleef subsequently claimed that she suffered a pay cut to her rate of pay in 2016 and wants to be awarded arrears of pay.

[182] In addition, Ms van Kleef has claimed that she has been underpaid for her rest breaks by the respondent rolling up pay for rest breaks into her piece rate.

Induction pay

[183] I understand that Ms van Kleef no longer pursues this claim.

Clause 8(g) of the Collective Agreement (shift allowance)

[184] I understand that Ms van Kleef no longer pursues this claim.

Clause 4(h) of the Collective Agreement (minimum of an hour's pay for working overtime)

[185] Clause 4(h) of the collective agreement provides:

When a worker has been notified on or before the previous day of intention to work overtime after the ordinary ceasing time as specified in subclause (b) of clause 3, such worker shall receive a minimum of one hour's pay at overtime rates.

[186] Mr Farrow referred me to the evidence of Mr Proctor, a former Plant Manager and Operations Manager at Pukeuri, who had worked for Alliance Group for 35 years. He said that clause 4(h) has appeared in every previous version of the collective agreement that he could recall and had always been interpreted to mean that Alliance had to give appropriate notice of overtime during usual working hours or it would have to pay a minimum of one hour's pay at penal rates. He said that the union has never suggested that it be interpreted any other way.

[187] Mr Farrow says that the clause cannot have been intended to indicate that all weekday overtime was to be paid as a minimum of one hour as the words: "when a worker has been notified..." would be superfluous.

[188] Mr Farrow also points out that, whilst clause 4(d) of the collective agreement provides for notice of weekend overtime to be provided, the agreement does not provide for specific notice of weekday overtime to be given. Mr Farrow says that the clause was negotiated and drafted by non-lawyers, and it represented a bargained agreement that incentivised a good faith communicative approach to providing notice of overtime. One hour's pay at penal rates would have to be provided if minimum notice was not given by the respondent.

[189] At first reading, clause 4(h) says the exact opposite of what Mr Farrow advocates. That is, when notice has been given on or before the day when overtime is intended to be worked, a minimum of one hour's pay at overtime rates must be paid. However, there is some force to what Mr Farrow argues, as the words "When a worker has been notified on or before the previous day..." are rather odd, when taken literally. Why would it disadvantage a worker, so they are entitled to this enhanced rate, to be given notice *before* the previous day of working overtime?

[190] It would make much more sense if the clause commenced "*Unless* a worker has been notified on or before the previous day...". That would indicate an intention that notice prior to the day when the overtime is to be worked is acceptable, but notice given later than that, on the day of the overtime, will attract the minimum rate of pay.

[191] That interpretation is, I believe, concordant with the practice about which Mr Proctor gives evidence. I believe, on a balance of probabilities, that the parties to the collective agreement intended for clause 4(h) to carry the meaning which it would have if the word "when" at the start of the clause were to be replaced with the word "unless".

[192] I believe that Ms van Kleef's claim is that all weekday overtime must be paid at a minimum of one hour's pay at penal rate. I do not agree that she had a right to such a minimum payment given the interpretation I have found for clause 4(h).

Clause 5.2 of the room agreement (step-up kill overtime)

[193] I understand that Ms van Kleef no longer pursues this claim.

Pay cut in 2016

[194] Ms van Kleef states that there was a unilateral decrease in carcass and cut difficulty rates in 2016, compared to the previous year. Ms van Kleef cites the 2015 carcass rate as 4.356 and the 2016 rate was 4.079. She says there were similar decreases in the difficulty rates as well.

[195] The respondent's explanation is that there was a new primal cutter introduced in 2016 which resulted in a reduction of 4 roles, which was reflected by a reduction in rates. Crucially, the respondent says that this was negotiated and agreed between the company and the union.

[196] Ms van Kleef has not produced evidence in rebuttal to show that there was no such agreement. Ms van Kleef was a member of the union and her terms and conditions were governed by agreements between the union and the company from time to time. As such, she cannot bring a claim, as the reduction was as a result of a binding agreement. If she did not know about the agreement affecting these rates, that may be due to a miscommunication with her union, although I can make no formal finding to that effect.

The rolling up of pay for rest breaks into piece rate

[197] Ms van Kleef says that the respondent is acting in breach of s 69ZD of the Act by rolling up her pay for rest breaks into her piece rate. However, first, this was agreed between the Union and the respondent during bargaining for the collective agreement, and so Ms van Kleef is bound by that agreement¹⁰. Second, insofar as that agreement may have been unlawful, the lawfulness of the practice is one of the issues to be determined by the Employment Court in *Ovation New Zealand Limited*, and so it is appropriate for the Authority to await the Employment Court's judgement on that issue.

¹⁰ This is in contrast with the finding of the Employment Court in *Lean Meats Oamaru Limited v New Zealand Meat Workers and Related Trades Union Incorporated* [2015] NZEmpC 176, where it was found that there was no such agreement

Was Ms van Kleef on strike and/or unlawfully locked out pursuant to s 82 of the Act?

[198] As well as saying she was unlawfully locked out, Ms van Kleef argues that she participated in a strike, which was lawful because she had reasonable grounds for believing that the strike was justified on the grounds of health and safety. She also cites s 83 of the Health and Safety at Work Act 2015, which refers to the right of a worker to cease or to refuse to carry out work if the worker believes that carrying out the work would expose him or her, or any other person, to a serious risk to their health and safety arising from an immediate or imminent exposure to a hazard.

[199] First, I do not accept that there was “a serious risk” to Ms van Kleef’s health and safety arising from “an immediate or imminent exposure to a hazard” by imposing on her a requirement to work 26 minutes overtime a day. I do accept that, the longer a worker works in a single day, especially in an environment presenting the challenges that the P5 room does, the more likely that there will be an adverse effect on that worker’s health and safety. However, that risk is likely to be incremental rather than immediate or imminent.

[200] However, more to the point, Ms van Kleef was not participating in a strike because her action in refusing to work overtime did not fulfil the definition of a strike in s 81 of the Act; namely, “the act of a number of employees...”, and her action was not “due to a combination, agreement, common understanding, or concerted action ...made or entered into by the employees“.

[201] Ms van Kleef also argues that the employer giving an ultimatum of a final written warning and working overtime, or being dismissed, and then being dismissed, amounted to an unlawful lockout of her because she would not comply with the respondent’s unlawful demands.

[202] It was accepted in *Conference of the Methodist Church of New Zealand v Gray*¹¹ that the definition of a lock out included the possibility of a lockout by a single employee (based upon the wording of section 62 of the Employment Contracts Act 1991 which is substantially identical to that of s 82 of the Act).

¹¹ [1996] 2 NZLR 554, [1996] 1 ERNZ 48 (CA)

[203] However, I do not accept that the actions of the respondent amounted to a lock out of Ms van Kleef, as none of the acts described in s 82(1)(a) were carried out by the respondent. What the respondent did was to offer to give Ms van Kleef a final written warning if she would work overtime or risk dismissal, and then later dismissed her. These actions did not constitute a lock out. They were disciplinary sanctions imposed because of a perception by the respondent that Ms van Kleef had refused to follow a lawful and reasonable instruction.

Conclusion

[204] I find that Ms van Kleef:

- a. Was unjustifiably dismissed;
- b. Was subjected to unjustified disadvantage in her employment by the respondent:
 - i. Giving Ms van Kleef inadequate notice of the meeting with her on 22 February 2017;
 - ii. Issuing her with a first written warning; and
 - iii. Not informing her of the meeting with the union representatives, and the remark made by Mr Kinnamon, on 22 February 2017.
- c. Did not receive her full break entitlements in accordance with her statutory and contractual rights.

[205] Mixed in with Ms van Kleef's submissions on the substantive merits of her claims were submissions on what remedies she should receive. As I made clear in a case management telephone conference call on 23 July 2018, I have decided to address remedies after a further investigation meeting because of the complexity of some of the losses to be quantified.

[206] A case management conference call will be arranged in due course so that the next steps necessary to investigate remedies can be discussed.

Costs

[207] Costs are reserved until after remedies due to Ms van Kleef have been determined.

David Appleton
Member of the Employment Relations Authority